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Provisional Remedies--Claim and Delivery--Priority of Lien Acquired Subsequent to Seizure of Property in Claim and Delivery Action

Carl R. Clontz
University of Kentucky

PROVISIONAL REMEDIES—CLAIM AND DELIVERY—PRIORITY OF LIEN ACQUIRED SUBSEQUENT TO SEIZURE OF PROPERTY IN CLAIM AND DELIVERY ACTION.— Defendant, while a resident of Michigan, mortgaged his automobile to plaintiff. He came to Kentucky, mailed plaintiff three monthly payments from a Kentucky address, and then defaulted on the mortgage. The mortgage was recorded only in Michigan. Plaintiff brought a claim and delivery action for the automobile. Upon seizure by the sheriff, defendant executed bond to plaintiff and the automobile was restored to him. While the action was pending and the defendant had possession by virtue of the bond, the automobile was damaged and defendant took it to a mechanic who repaired it. The mechanic intervened in the claim and delivery action and asserted his mechanic's lien, claiming that this lien was superior to plaintiff's rights in the property. The trial court held that the mechanic's lien was superior. *Held*: Reversed. Seizure by the sheriff placed the automobile in the legal custody of the court. The bond gave defendant only a bare right of possession, subject to the legal possession and control of the court. He "did not have the power to incur a lien against the automobile that could take precedence over the claim of the plaintiff in the action in which the automobile had been seized."[1] *Manufacturer National Bank of Detroit v. Greenwade*, 329 S.W.2d 586 (Ky. 1959).

This appears to be the first Kentucky case considering, in a claim and delivery action, the priorities between the holder of a lien incurred or suffered by the defendant after possession has been restored to him on giving bond and the plaintiff who has an executed order of delivery. However, similar questions have arisen with respect to property that had been attached and thereafter returned to the defendant because he had executed bond to the plaintiff. The Kentucky court in the principal case said that the reasoning of the attachment cases was applicable to a claim and delivery case and in a brief opinion held that the claim of the plaintiff was superior to any lien acquired while the defendant was in possession by reason of his bond.

Although the court might be correct in holding that plaintiff's claim to the automobile was superior to the mechanic's lien, it is doubtful whether the court used the proper basis for its decision. The nature of attachment and claim and delivery are so different that it is difficult to see how the reasoning of one could validly be transferred to the other.

Claim and delivery is a statutory substitute for the common-law

[1] Manufacturers Nat'l Bank of Detroit v. Greenwade, 329 S.W.2d 586, 587 (Ky. 1959).

action of replevin.[2] Through such an action, a plaintiff may recover the possession of specific personal property at the commencement of the action, or at any time before judgment,[3] unless the defendant or the one having possession of the property executes bond to the plaintiff.[4] In order for a plaintiff to obtain possession he must file a proper affidavit with the clerk,[5] who then addresses and delivers to the sheriff an order of delivery.[6] The sheriff executes this order by seizing the property.[7] If the defendant does not execute bond to the plaintiff within two days, the sheriff must deliver the property to planitiff.[8] Thus, the bond which permits the defendant to retain the property is a substitute for the immediate possession to which the plaintiff would otherwise be entitled. The same is not true in the case of attached property.

Attachment is a provisional remedy through which plaintiff has the sheriff seize a portion of defendant's property at the commencement of the action in order to insure its availability for the satisfaction of the money judgment the plaintiff is seeking.[9] If, after seizure of personal property the defendant does not execute bond to plaintiff, possession remains in the sheriff, subject to order of the court.[10]

There are two bonds by which a defendant may recover possession of personal property that has been seized pursuant to an order of attachment. One is commonly called a "forthcoming" bond. By such bond the defendant covenants to the plaintiff that he will "perform the judgment of the court . . . or that the property or its value shall be forthcoming and subject to the order of the court."[11]

If the defendant wants possession of the property, and does not wish to execute a forthcoming bond, he may have the attachment discharged by executing a bond to plaintiff to the effect that he will perform the judgment of the court.[12] It can readily be seen that the effect of a forthcoming bond is to insure that the property or its value will be available for execution, whereas a bond to discharge the attachment is a judgment bond. The effect of these bonds was discussed by the Court of Appeals in *Hudson Engineering Co. v. Shaw*:[13]

[2] See Ky. Rev. Stat. (hereinafter referred to as KRS) §§ 425.120-.180 (1959).
[3] KRS § 425.120 (1959).
[4] KRS § 425.155 (1959).
[5] See KRS § 425.125 (1959).
[6] KRS § 425.145 (1959).
[7] KRS § 425.145 (1959).
[8] KRS § 425.155 (1959).
[9] See KRS § 425.185.
[10] See KRS §§ 425.225(2), 280, 305 (1959).
[11] KRS § 425.280(1) (1959).
[12] KRS § 425.305(1) (1959).
[13] 167 Ky. 27, 179 S.W. 1083 (1915).

> [A forthcoming bond] is a mere obligation for the forthcoming of the property; the lien created by the attachment, and the power of the court over the attached property, subsist and continue as effectually as if no bond had been given, or the possession never taken out of the hands of the officer; and continues until final judgment is rendered disposing of the attachment. . . .. On the other hand, where . . . [a bond to discharge the attachment is executed], all power of the court and its officers over the attached property ceases, and plaintiff can look only to the bond.[14]

The "reasoning of the attachment cases" on which the court based its decision in the instant case is clearly expressed in the above quotation. Attached property in defendant's possession by reason of his forthcoming bond is still subject to the control of the court and cannot be encumbered with a lien superior to that of the attaching plaintiff. While this reasoning may be valid when applied to attached property, it is difficult to see how it has anything to do with the automobile in the present case. If the defendant had not executed bond, the plaintiff, not the sheriff or the court, would have had possession. The control of the automobile would have been in the plaintiff rather than the court. Thus, it seems that the court was on tenuous ground when it based its decision in this case on the "reasoning of the attachment cases."

A more reasonable basis for deciding that plaintiff's claim was superior to the mechanic's lien would have been to hold that either the filing of the action[15] or the seizure of the property gave *notice* of plaintiff's interest in the property and that subsequent to this notice no lien effective against whatever interest the plaintiff might have could be incurred or suffered by defendant. The existence and effect of the mechanic's lien might depend upon the outcome of the claim and delivery action,[16] but the lien would still be subordinate to any interest of the plaintiff of which there was notice.

Despite the fact that the mechanic's lien was inferior to plaintiff's interest in the automobile, the repairman probably had grounds for relief. If the automobile had not been repaired, plaintiff would have had to rely upon the bond for the loss in value. He probably could have taken the damaged automobile and looked to the bond for the losses occasioned by the damage,[17] or he could have refused

[17] There does not seem to be any specific authority sanctioning this election, but it should be available if the plaintiff so chose, for the bondsman would not complain, and the defendant would have no grounds to complain.

[14] *Id.* at 33, 179 S.W. at 1085.

[15] This would be common law lis pendens, which apparently is still in effect in Kentucky. See P. A. Stark Piano Co. v. Fannin, 212 Ky. 640, 279 S.W. 1080 (1926).

[16] If the defendant prevailed, or if plaintiff's interest was less than the value of the automobile, the lien would be effective to the extent of any interest the defendant might have.

the property and looked to the bond for the assessed value of the automobile at the time it was seized.[18] In either case the defendant or his bondsman would be responsible for the loss in value due to the damage, and since defendant evidently is insolvent, the bondsman would be responsible. If defendant is insolvent and if the mechanic does not have an effective lien because of the priority of plaintiff's claim, the bondsman has been unjustly enriched at the expense of the mechanic. Thus it seems there were adequate grounds for an action in quasi-contract[19] or in equity.[20]

Both the intervening mechanic and the court[21] appear to have misunderstood the law of this case. The mechanic misconstrued his remedy and attempted to enforce a lien, instead of relying on quasi-contract or his equitable remedy. The court used the wrong basis for its decision that the plaintiff's interest was superior to the mechanic's lien. If a similar case were to arise in the future, a mechanic should not be hampered by this decision, for as long as he does not misconstrue his remedy and attempt to rely upon his lien, the question of priority of claims will not arise, and the present case will be irrelevant. However, if the question of priority should arise again, the court should acknowledge the mistake made in this case and place the decision on a sound basis of law.

Carl R. Clontz

TORTS—CONTRIBUTORY NEGLIGENCE—EFFECT OF THE VIOLATION OF A STATUTE BY AN EIGHT-YEAR-OLD CHILD.— Plaintiff brought suit to recover damages for injuries sustained by his eight-year-old and five-year-old sons who were struck by defendant's automobile as they were crossing a street where there was no crosswalk. The eight-year-

[18] KRS § 426.300 (1959).

[19] Since "the law implies a promise where the party ought to promise," the bondsman might be liable on an implied contract. See Goodall v. Warden's Adm'r, 280 Ky. 632, 133 S.W.2d 944 (1939); see also, Fayette Tob. Whse. Co. v. Lexington Tob. Bd. of Trade, 299 S.W.2d 640 (Ky. 1957); Kellum v. Browning's Adm'r, 231 Ky. 308, 21 S.W.2d 459 (1929).

[20] One theory would be equitable subrogation. Since the bondsman would have been liable to the plaintiff for the damages to the automobile, the mechanic has in effect "paid" the debt of the bondsman. Since he was not a volunteer, the mechanic, to prevent unjust enrichment, should be subrogated to the plaintiff's rights against the bondsman. See Chapman v. Blackburn, 295 Ky. 606, 175 S.W.2d 26 (1943); McCracken County v. Lakeview Country Club, 254 Ky. 515, 70 S.W.2d 938 (1934).

[21] The plaintiff also failed, for the court pointed out in the opinion that the briefs only argued the question of whether the plaintiff was required to record its mortgage in Kentucky in order to preserve its interest against third parties.